No. 91-1733

In the Supreme Court of the United States

OCTOBER TERM, 1992

FRED W. ALLNUTT, SR., PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

KENNETH W. STARR
Solicitor General

JAMES A. BRUTON
Acting Assistant Attorney General

ROBERT S. POMERANCE
CURTIS C. PETT
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether imposition of additions to tax for fraudulent underpayment of income taxes and for failure to pay estimated taxes violates the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 *et seq.*

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-2) is unreported, but the decision is noted at 956 F.2d 1162 (Table). The opinion of the Tax Court (Pet. App. 3-19) is unofficially reported at 61 T.C.M. (CCH) 1636.

JURISDICTION

The judgment of the court of appeals was entered on February 26, 1992. A petition for rehearing was denied on March 25, 1992. The petition for a writ of certiorari was filed on April 29, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Although petitioner received large amounts of income from his construction business during 1981 through 1986, he failed to file a federal income tax return or to pay federal income tax for any of those years (Pet. App. 6). He placed his assets in trusts with fictitious names and used other devices in an effort to conceal his true income (*id.* at 8-11). Following an audit, the Internal Revenue Service asserted substantial deficiencies in petitioner's income taxes for 1981 through 1986, together with additions to tax for civil fraud and for failure to pay estimated taxes. See 26 U.S.C. 6653(b), 6654.

2. The Tax Court sustained the income tax deficiencies and additions to tax in full (Pet. App. 3-19). The court rejected petitioner's argument that the Paperwork Reduction Act of 1980 (PRA), 44 U.S.C. 3501 *et seq.*, excused him from liability for penalties and additions to tax stemming from his failure to report and pay income taxes (Pet. App. 12-13, 19). Finding petitioner's arguments to be frivolous and to have been asserted primarily for delay, the court imposed the maximum penalty of $25,000 against petitioner under Section 6673 of the Internal Revenue Code, 26 U.S.C. 6673 (Pet. App. 18-19).

The court of appeals found petitioner's reliance on the PRA to be without merit and affirmed on the reasoning of the Tax Court (Pet. App. 1-2).

ARGUMENT

The court of appeals correctly held that the imposition of additions to tax against petitioner for his failure to report and pay his income taxes does not violate the PRA. The decision in this case does not conflict with any decision of this Court or of any other courts of appeals. Further review is therefore not warranted.

1. The PRA was enacted to relieve the paperwork burden on the public of complying with information

requests of federal agencies. See *Dole* v. *Steelworkers*, 494 U.S. 26, 32-33 (1990). The Act generally restricts an agency from promulgating an "information collection request" after December 31, 1981, without the approval of the Office of Management and Budget (OMB). See 44 U.S.C. 3507(a)(2). The term "information collection request" is defined broadly to include a form, questionnaire or other writing designed to gather information. 44 U.S.C. 3502(11). The PRA provides that a penalty may not be imposed for noncompliance with an information collection request that does not carry a control number signifying the approval of OMB. 44 U.S.C. 3504(c)(3)(A), 3507(f), 3512. See *Dole* v. *Steelworkers*, 494 U.S. at 40.

The PRA does not exempt petitioner from liability for the civil tax penalties involved in this case. These additions to tax are not grounded on his failure to comply with an information collection request of an administrative agency. Instead, they arise from his breach of the statutory obligation to report his income and to pay taxes, a duty that Congress imposed under Section 6012 of the Internal Revenue Code (26 U. S. C. 6012(a)(1)(A)):

> Returns with respect to income taxes under subtitle A shall be made by * * * [e]very individual having for the taxable year gross income which equals or exceeds the exemption amount * * *.

The courts of appeals have consistently rejected the argument that the PRA forbids imposing sanctions against a person who fails to file income tax returns or to pay taxes as required by the revenue laws. See *United States* v. *Wunder*, 919 F.2d 34, 38 (6th Cir. 1990) (PRA does not preclude criminal prosecution of nonfiler under 26 U.S.C. 7203, for the "[d]efendant was not convicted of violating a regulation but of violating a statute [§ 6012] which required him to file an income tax return");

United States v. *Dawes*, 951 F.2d 1189, 1192 (10th Cir. 1991) (same); *United States* v. *Hicks*, 947 F.2d 1356, 1359 (9th Cir. 1991) (same); *United States* v. *Bentson*, 947 F.2d 1353, 1355 (9th Cir. 1991) (same), cert. denied, 112 S. Ct. 2310 (1992); *United States* v. *Kerwin*, 945 F.2d 92 (5th Cir. 1991) (same). See also *Beam* v. *Commissioner*, 59 T.C.M. (CCH) 915 (1990) (PRA not a defense to civil penalties for failure to file proper tax returns), aff'd by unpublished opinion, 956 F.2d 1166 (9th Cir. 1992), petition for cert. pending, No. 91-1968.

2. Petitioner errs in arguing (Pet. 21-23) that the PRA excuses him from liability for the additions to tax on the theory that a Treasury Regulation construing Section 6091 of the Internal Revenue Code lacks OMB approval. Section 6091 grants authority to the Treasury to designate by regulations the place for filing a tax return. 26 U.S.C. 6091. The regulations under this statute provide that an income tax return is to be filed with the service center for the internal revenue district in which a taxpayer resides or has a principal place of business. See Treas. Reg. § 1.6091-2. Those provisions are not implicated in this case, for petitioner was not penalized for filing returns with the wrong service center. Instead, petitioner was subject to penalties because he filed *no* returns at all for six years in succession, in violation of clearly expressed statutory requirements. Petitioner is liable for the penalties resulting from his flagrant disregard of the statutory duty to report and pay his taxes. See *United States* v. *Bowers*, 920 F.2d 220, 222 (4th Cir. 1990). The regulations he challenges have no bearing on this case. [1]

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[1] Petitioner's argument that Treas. Reg. § 1.6091-2, and not 26 U.S.C. 6012, represents the principal "source" of the duty to file a tax return (Pet. 21) has no merit. The cases upon which he relies (Pet. 21 & n.22, 24) do not support his contention. Those cases addressed the question of proper venue in criminal tax prosecu-

3. Petitioner errs in asserting (Pet. 17-21, 23, 25) that the decision in this case conflicts with this Court's decision in *Dole* v. *Steelworkers*, 494 U.S. at 26, and with the decisions in *Action Alliance of Senior Citizens* v. *Sullivan*, 930 F.2d 77 (D.C. Cir.), cert. denied, 112 S. Ct. 371 (1991); *United States* v. *Hatch*, 919 F.2d 1394 (9th Cir. 1990); and *United States* v. *Smith*, 866 F.2d 1092 (9th Cir. 1989). The focus of each of those cases was a disclosure requirement promulgated by a federal agency through regulatory or other administrative action.[2] In the present case, however, petitioner was not penalized for

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tions for failure to file a tax return. Since criminal tax prosecutions are generally brought in the judicial district in which the taxpayer was required to file the return, the courts looked to 26 U.S.C. 6091 for the limited purpose of determining venue. See *United States* v. *Dawes*, 874 F.2d 746, 750 (10th Cir.), cert. denied, 493 U.S. 920 (1989); *United States* v. *Garman*, 748 F.2d 218, 219-221 (4th Cir. 1984), cert. denied, 470 U.S. 1005 (1985); *United States* v. *Grabinski*, 727 F.2d 681, 684 (8th Cir. 1984); *United States* v. *Rice*, 659 F.2d 524, 526 (5th Cir. 1981); *United States* v. *Calhoun*, 566 F.2d 969, 973 (5th Cir. 1978); *United States* v. *Lawhon*, 499 F.2d 352, 355 (5th Cir. 1974), cert. denied, 419 U.S. 1121 (1975); *United States* v. *Ramantanin*, 452 F.2d 670, 671 (4th Cir. 1971); *United States* v. *Gorman*, 393 F.2d 209, 213-214 (7th Cir.), cert. denied, 393 U.S. 832 (1968).

[2] *Dole* v. *Steelworkers* involved a "hazardous communication standard" published by the Department of Labor, requiring manufacturers of hazardous chemicals to label their products with appropriate warnings. This Court held that the agency's disclosure rules did not constitute an "information collection request" within the purview of the PRA. 494 U.S. at 41. In *Action Alliance*, the District of Columbia Circuit held that a regulation of the Department of Health and Human Services requiring funding recipients to demonstrate compliance with the Age Discrimination Act of 1975 was within the scope of the PRA. 930 F.2d at 78. In *Hatch* and *Smith*, the Ninth Circuit overturned the convictions of miners who violated information collection requirements imposed by regulations of the Forest Service that lacked OMB approval. 919 F.2d at 1398; 866 F.2d at 1099.

disregarding an information request of a federal agency, but for flouting the statutory duty to file returns and pay taxes. The PRA thus has no application to this case. See, *e.g.*, *United States* v. *Bowers*, 920 F.2d at 222; *United States* v. *Wunder*, 919 F.2d at 38.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

JAMES A. BRUTON
Acting Assistant Attorney General

ROBERT S. POMERANCE
CURTIS C. PETT
Attorneys

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